BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CLIFFORD LARRANCE, Appellant, V. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and JEFFERSON COUNTY, Respondents.	SHB No. 92-49 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter was heard by the Shorelines Hearings Board ("Board") on November 25, 1992 in Poulsbo, Washington. Sitting for the Board were": Robert Jensen, Attorney member, presiding; Harold S. Zimmerman, Chairman; Nancy Burnett; Mark Erickson; and Paul Cyr. Board member Annette S. McGee reviewed the tapes of the hearing and the record.

The proceedings were recorded by Kathy Juntila, court reporter, affiliated with Gene S. Barker and Associates, Inc. of Olympia, Washington.

Clifford Larrance appeared through his attorney, J.R. Sherrard. The Department of Ecology ("Ecology") was represented by Mark Jobson, Assistant Attorney General. Jefferson County appeared through Mark Huth, Prosecuting Attorney.

Having heard the testimony, examined the exhibits, heard oral argument, and reviewed the briefs submitted on behalf of the parties, the Board makes these:

FINDINGS OF FACT

I

Mr. Larrance owned waterfront property in Jefferson County, along Hood Canal, a shoreline of state-wide significance. Portions of the property lie within 200 feet of the ordinary high water mark. The property is characterized by a 100 foot bank with a slope of approximately 50 degrees. This bank area is referred to as an "unstable recent slide area," in Volume 11 of the Washington Coastal Zone Atlas. To the south of the area concerned in this appeal, but still on the Larrance property, there is a bare slope, evidencing past erosion.

II

Mr. Larrance is in the construction business. He has done shoreline work in the past, primarily on bulkheads. He acquired this property from Pope Resources in 1988-89. The tract is five acres in size, and comprises 200-300 feet of waterfront. There was an old skidder road to the beach, which in more recent times was in the form of a game trail to the beach. This trail included two or three switchbacks down the bluff. There have been several slides on the bluff.

III

Danae Larrance, Cliff Larrance's wife, approximately four years ago obtained an approval for a shoreline exemption for a client, from

Jefferson County. Mr. Larrance, in March or April 1990, discussed with Jefferson County the application of the Shoreline Management Act to a potential project on Discovery Bay.

IV

A slide occurred in the winter of 1989-90, which buried much of the trail. Mr. Larrance bulldozed a new trail, which was in approximately the same location as the old trail. The major differences between it and the old trail were that it was lower on the slope, above the switchback; and the first turn was to the south of the original location. Mr. Larrance cut through the slide into the bank a distance of approximately two feet. The vertical height of the cut, measured on the upper bank, was more than six feet above the trail. The bulldozer blade was eight feet wide. Some of the soil and debris, including alder trees from the cut, ended up on the beach in a pile of three to four cubic yards of material. The material on the beach has since washed away Mr. Larrance spent from one to two hours on this earthwork. The going rate for bulldozer operators in the area is $55.00 an hour.

V

James Pearson, Associate Planner for the Jefferson County Planning and Building Department, subsequently received a telephone call from a resident, who asked whether the County had authorized the access road on the Larrance property. Mr. Pearson went to the site on

August 30, 1990 and videotaped the work done on the property. Subsequently, he sent a certified letter to Mr. Larrance, notifying him of a potential violation of the Shoreline Management Act. The letter requested information regarding the work in the form of a report to the County Planning and Building Department.

VI

Mr. Larrance responded to the County with a letter dated September 5, 1991. Mr. Larrance explained that he was maintaining an existing trail to the beach. He did not believe that prior County approval was required.

VII

Subsequently, Mr. Pearson and Mr. Larrance met on the site. Mr. Larrance had planted the site with grass seed in June; however, it did not take hold. As a result of the meeting, Mr. Larrance agreed to place a drainage pipe to divert the water from the unstable materials. He also agreed to reseed the property.

VIII

Mr. Pearson contacted Ecology. Jim Anest, Environmental Coordinator for shorelands, agreed to make a site visit. On September 19, 1991, he went to the site with Mr. Larrance. What he saw at that time was consistent with the video taken by Mr. Pearson. Mr. Anest discussed the matter with his superior. Ecology determined that a stop work order would be appropriate.

IX

Mr. Pearson wrote a letter to Mr. Larrance confirming the position of the County Planning and Building Department, and the conversations during the previous site visit of September 23, 1991. The letter advised Mr. Larrance to obtain a soils engineer to assess the situation, and to recommend remedial measures.

X

On November 6, 1991, Ecology and Jefferson Jointly issued to Mr. Larrance an Order and Notice of Penalty Incurred. The order contained a fine of $1000. It further directed Mr. Larrance to cease and desist from all further development of the shorelines without a proper shoreline permit or exemption, or enforcement order of Ecology, and Jefferson for restoration of the site. Finally, the order obliged Mr. Larrance to submit an engineered restoration plan within 30 days.

XI

Pope Resources hired a geological consultant, Northwestern Territories, Inc. ("NTI"), pursuant to the County's recommendation. The consultant recommended restoring the bluff terrain "as close to its original condition as possible". The firm specifically recommended reseeding by hand, the planting of 100 to 150 fir seedlings, and surface drainage diversion. The report was dated: October 1991. It was forwarded to Ecology, after issuance of the enforcement order, on December 6, 1991. Larrance subsequently hired NTI, at a cost of $1000.

XII

Mr. Larrance sold the property to a Mr. Street in December 1991. He continues however to assume responsibility for restoration of the property. In February 1992, Mr. Pearson returned to the site. He observed a new slide below the switchback of the new trail. This slide went to the toe of the bluff and was to the south of the point where the trail meets the beach. This slide contained material from the newly constructed trail. NTI, in a follow-up investigative report, dated September 1992, concluded that the property would not be an area of accelerated erosion, based on the restoration.

XIII

Mr. Larrance reseeded the property on four different occasions. The grass has taken hold on the trail below the first switchback, and as well on the slide below that switchback. He has placed a plastic drain pipe to divert the flow of surface water. Finally, he has planted approximately 150 conifer seedlings along the trail. NTI, in a follow-up investigation report, dated September 1992, based on the restoration, concluded that the property would not be an area of accelerated erosion.

XIV

Mr. Larrance applied for relief from the civil penalty, from Ecology. Ecology On September 9, 1992, after it was satisfied that the restoration efforts were complete, reduced the fine in half.

XV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The Shoreline Management Act requires that all development and uses undertaken on the shorelines of the state be consistent with the policies of the Act, the guidelines and regulations of Ecology, and the applicable master program. RCW 90.58.140(1); Clam Shacks v. Skagit County, 109 Wn. 2d 91, 95-97, 743 P.2d 265 (1987).

II

Local governments and Ecology are authorized to issue civil penalties and regulatory orders to

> Any person who shall fail to conform to the terms of a permit issued under this chapter or who shall undertake development on the shorelines of the state without first obtaining any permit required under this chapter...

RCW 90.58.210(2); chapter 173-17 WAC.

III

Development is defined under the Act as:

> a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters of the state...

RCW 90.58.030(3)(d). Mr. Larrance's bulldozing and building a new trail to the beach, constituted development under the Act.

IV

Mr. Larrance first contends that his work is exempt from the Act because it constitutes normal maintenance and repair. We are not convinced that construction of the new trail meets the definition of normal maintenance and repair. The Shoreline Management Act is to be liberally construed on behalf of its purposes. RCW 90.58.900; Clam Shacks, at 109 Wn.2d 91,97. Concomitantly, exemptions from it should be narrowly defined. See Mead School Dist. v. Mead Education, 85 Wn. 2d 140, 145, 530 P.2d 302 (1975)(holding that the liberal construction command of the Open Public Meetings Act implies an intent that the act's exemptions be construed strictly). WAC 173-14-040(1)(b) defines normal maintenance or repair as follows:

> usual acts to prevent a decline, lapse, or cessation from a lawfully established condition...to restore a development to a state comparable to its original condition within a reasonable period except where repair involves total replacement which is not common practice or causes substantial adverse effects to the shoreline resource or environment.

While the new trail generally follows the old contours, it is admitted that it lies a few feet below the original trail prior to the switchback, and that the trail switchback is somewhat north of its previous location.

V

We need not resolve this issue, however, because the exemption for normal maintenance and repair is only from the definition of substantial development, not development. RCW 90.58.030(3)(d) and (e).

VI

Mr. Larrance next contends that the exemption process of Jefferson County does not lawfully constitute a permit process under the Shoreline Management Act; therefore, he cannot be penalized under RCW 90.58.210(2) for not obtaining a permit before undertaking the development. His counsel relies on Ritchie v. Markley, 23 Wn. App. 569, 572-74, 597 P.2d 449(1979). That case is inapposite. It held unconstitutional a county ordinance that conflicted with the Shoreline Management Act. The county ordinance required a substantial development permit for agricultural activities which were specifically exempt from the substantial development permit requirement, under RCW 90.58.030(3)(e)(iv). In this case, the Jefferson County exemption process is a part of the master program approved by Ecology as a state regulation. RCW 90.58.120.

VII

RCW 90.58.200 grants to Ecology and local governments, the authority to adopt "such rules as are necessary and appropriate to carry out the provisions of this chapter". The Board has the

jurisdiction to determine, in adjudications involving shoreline civil penalty or regulatory order appeals, whether Ecology's regulations, as applied, are within its statutory authority. See D/O Center v. Department of Ecology, 119 Wn.2d 761, 774-77, _____P.2d _____ (1992)(holding that the Pollution Control Hearings Board has jurisdiction to rule on whether Ecology's State Environmental Policy Act ("SEPA") regulation regarding categorical exemptions is consistent with SEPA and other environmental laws administered by Ecology, in the context of an appeal of an Ecology waste discharge permit).

> Where the Legislature has specifically delegated to an administrator the power to make regulations, such regulations are presumed valid. The burden of overcoming this presumption lies on the challenger. Judicial review is limited to a determination of whether the regulation in question is reasonably consistent with the statute being implemented.

Omega Nat'l Ins. Co. v. Marquardt, 115 Wn.2d416, 423, 799 P.2d 235 (1990).[1/]

[1/] A broader standard of review may be applicable where one is challenging under RCW 34.05.570(2)(c), whether the regulation "could not conceivably have been the product of a rational decision-maker." See Chamber of Commerce v. Department of Fisheries, 119 Wn.2d 464, _____ P.2d _____ (1992)(5-4 decision). Mr. Larrance has not raised this issue. The burden of proving that the regulation is invalid under this test is on the party challenging the regulation. In any event, we believe that the challenged regulation satisfies the test of Chamber of Commerce.

VIII

Mr. Larrance has failed to demonstrate that the master program exemption process of Jefferson County is inconsistent with the Shoreline Management Act's strong regulatory regimen over all shoreline development. It is good planning and good law for the county to have an opportunity to review shoreline development before it occurs, in order to fully carry out its obligation to see that all shoreline development in the county is consistent with its master program. Mr. Larrance was seeking pedestrian access to the beach below the bluff. Both he and the public would have benefited from prior review to see if his plans provided an appropriate shoreline result . One example of an alternative that could have been explored would have been a staircase to the beach.

IX

It has been held that the Board does not have authority to hear an appeal from a local government's denial of a shoreline exemption. Putnam v. Carroll, 13 Wn. App. 201, 204-05, 534 P.2d 135 (1975); accord Bandy v. Jefferson County and State of Washington, Department of Ecology, SHB No. 89-8 (May 5, 1989). However, that is a different question from that presented here. In this case, the Board clearly has jurisdiction to hear appeals of civil penalties. The issue is whether the County's exemption process qualifies as a permit, as the term is employed in RCW 90.58.210(2). The term permit is not defined

in the Act. However, Ecology defines it as follows in WAC 173-17-040(6), for the purposes of RCW 90.58.210(2):

> "Permit" means any form of permission required under the act prior to undertaking activity on shorelines of the state, including substantial development permits, variances, conditional use permits, permits for oil or natural gas exploration activities, permission which may be required for selective commercial timber harvesting, and shoreline exemptions...(emphasis added)

XII

Jefferson County's Master Program ("JCMP") requires prior approval of exemptions, as follows:

> Whenever a development is eligible for exemption under Subsection 3.402 of the Master Program, the proponent shall secure an exemption from the Planning and Building Department prior to the commencement of the development.

JCMP Section 3.40, Subsection 3.401. We conclude that Jefferson County's requirement of prior approval for shoreline exemptions constitutes a permit, as that term is utilized in RCW 90.58.210(2).

XIII

Mr. Larrance has not challenged the amount of the permit. We note that Ecology reduced the fine by one-half, after it was satisfied that Mr. Larrance had completed good faith efforts to restore the shoreline to its original condition. Mr. Larrance, however knew, or

should have known of the County shoreline requirements, particularly in light of his prior involvement in shoreline development. We conclude that the amount of the penalty is reasonable.

XIV

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this:

ORDER

Jefferson County's and Ecology's Order and Notice of Penalty Incurred on November 6, 1991, and Ecology's Notice of Disposition Upon Application For Relief From Penalty (reducing the civil penalty from $1000 to $500), are affirmed.

DONE this 15th day of December, 1992

SHORELINES HEARINGS BOARD

ROBERT V. JENSEN, Presiding Member

HAROLD S. ZIMMERMAN, Chairman

ANNETTE S. MCGEE, Member

NANCY BURNETT, Member

PAUL CYR, Member

MARK ERICKSON, Member

0013Z